Dam 22 – Argued by Mr. Williams for Q
Sent. & accepted
May 26, Off. Dam

Reception & Disposal of Captures & Prizes 12 Wheat. 9
Purchase & Salvage 2 U.S. St. 763
Destitute Crews & Prize Disposal compare of Captures
as in Civil Cases of Admiralty Jurn. 2 U.S. St. 701
Captures

SUPREME COURT OF THE UNITED STATES.

No. ~~194.~~ 110.

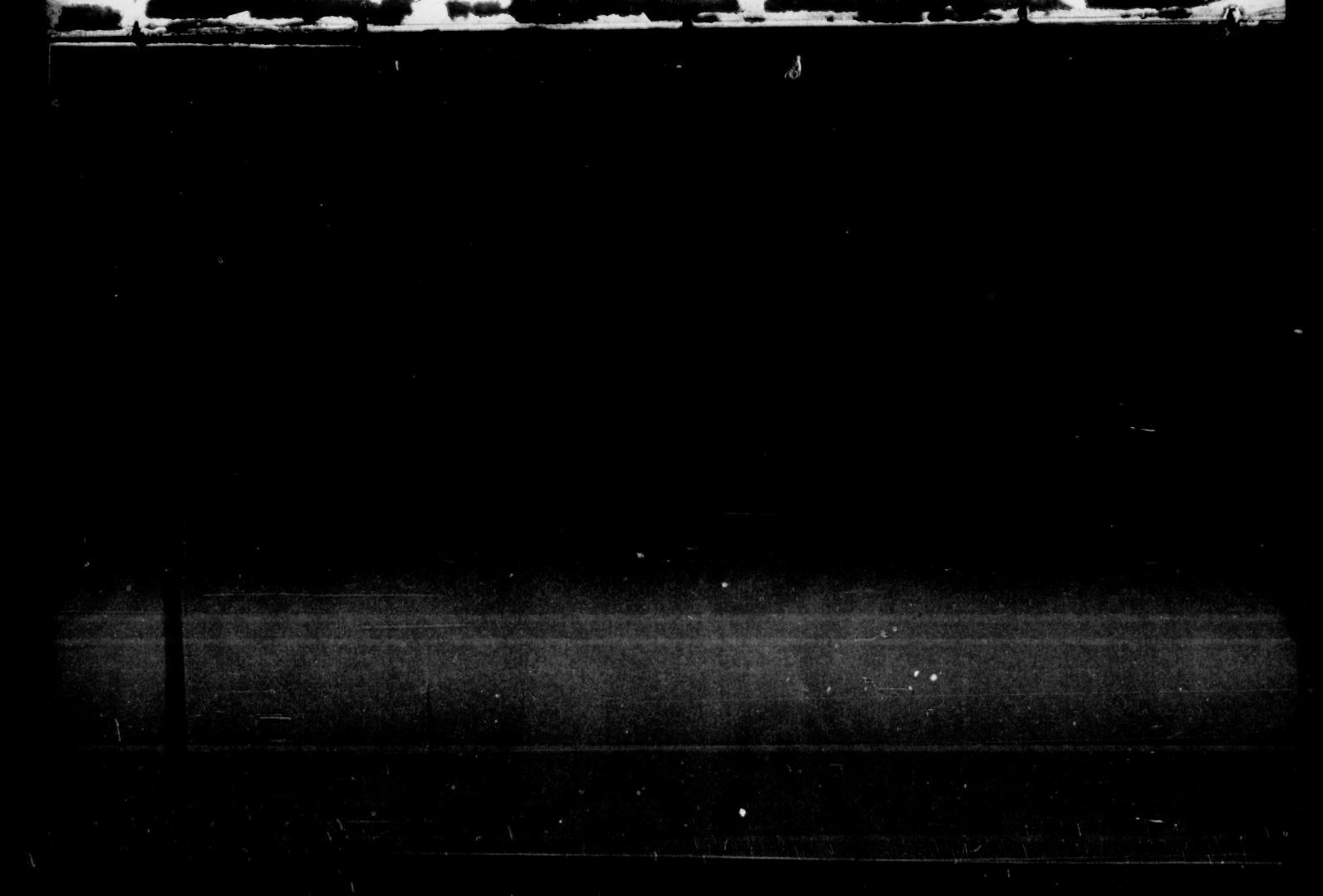
SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. GAUSE, LIBELLANTS AND APPELLANTS,

vs.

THE UNITED STATES AND AUGUSTUS JOHN ADDERLY, CLAIMANT OF THE STEAMSHIP NASSAU (LATE GORDON,) HER TACKLE, APPAREL, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.



SUPREME COURT OF THE UNITED STATES.

No. 194.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. GAUSE, LIBELLANTS AND APPELLANTS,

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1 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel R. Betts, district judge.

SAMUEL HARLAN, JR., *et als.*
vs.
THE STEAMER NASSAU, LATE GORDON, HER TACKLE, &C. } 17, 200.

JUNE 17, 1862.

The libellants file their libel in the words and figures following, to wit:

To the judge of the district court of the United States for the southern district of New York:

The libel of Samuel Harlan, jr., Elijah Hollingsworth, and John T. Ganse, ship and steamboat builders and repairers, at Wilmington, in the State of Delaware, and now, and during all the time herein referred to, doing and carrying on the business aforesaid, under the name, firm, and style of Harlan & Hollingsworth & Company, against the steamship Nassau, lately
2 known as and called the Gordon, her tackle, apparel, and furniture, boats and other appurtenances, and against her owners, captors, and all other persons whatsoever, having, or claiming to have, any right, title or interest in or to said steamship, her tackle, apparel and furniture, boats and other appurtenances, in a cause of contract civil and maritime.

And thereupon the said Samuel Harlan, jr., Elijah Hollingsworth and John T. Ganse do allege and articulately propound as follows:

First. That your libellants and during all the time herein referred to, have been engaged, among other things, in the repairing of steamships, and have during all the time aforesaid resided and carried on said business, and still reside and carry on said business at Wilmington, in the State of Delaware, under the style and firm-name of Harlan & Hollingsworth & Co.

Second. That during all the time aforesaid the said steamship, now called Nassau, but lately called Gordon, was owned and controlled, navigated and managed, and is still (or until very lately) owned and controled, navigated and managed by some person or persons not living, being, or residing in
3 the said State of Delaware, but elsewhere and out of said State of Delaware, to wit, at Charleston, in the State of South Carolina, or Savannah, in the State of Georgia, or by a corporation formed under and by the laws of the said State of South Carolina, and existing as such corporation in the said State of South Carolina, and not elsewhere.

Third. That while said steamship was so owned, controlled, navigated, and managed as aforesaid, to wit, in the month of July, in the year 1860, the same while engaged in prosecuting a voyage upon the high seas, between different states and countries, was by her then captain and master navigated into the said port of Wilmington, in a worn and damaged condition, and in great need of repairs, to enable her to navigate the high seas in the continuation and prosecution of the voyage in which she was then engaged; that thereupon her said captain applied to your libellants to make such needed repairs in and about said steamship to enable her to prosecute her said voyage in which she was then engaged.

Fourth. That the owner of said steamship had at the time aforesaid
4 no credit in said port of Wilmington or elsewhere in said State of Delaware, and were wholly unable to obtain the said repairs save upon the credit of the said steamship, to wit, the maritime lien or hypothecation thereof, under the general maritime law.

Fifth. That your libellants, pursuant to the said application, and in com-

pliance with the said request of the said captain and master of said steamship, and relying upon the said lien or hypothecation given by the said maritime law in such cases, did at the port of Wilmington aforesaid, make, furnish, and procure, and did cause to be done, made, furnished, and procured, such needed repairs to the said steamship, and did procure, furnish, and cause to be procured and furnished, all needed and necessary materials therefor, to wit, boilers, and other iron and wood work in and about the engine of said steamship, and elsewhere about her, and divers sails, canvas, and other repairs to her iron and wood work, which said materials and repairs were reasonably worth the sum of $17,872 36-100.

Sixth. That immediately after the said repairs were so done and completed as aforesaid, the said captain and master navigated the said steamship
5 out of and away from the said port of Wilmington, and said State of Delaware, to wit, on her said voyage upon the high seas between ports and places in different states and countries; and that your libellants have at length ascertained that said steamship has arrived in the port of New York, and within the jurisdiction of this honorable court, where she now lies.

Seventh. That the sum of $10,246 15-100, besides interest, still remains due, owing, and unpaid to your libellants for the said materials and work done, furnished and performed, and paid for by them in and about the said repairs of said steamship over above all payments and discounts.

Eighth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof, if denied, your libellants pray leave to refer to depositions and other proofs that may be taken or offered therein.

Whereupon your libellants pray that process in due form of law, according to the course of this honorable court is cases of admiralty and
6 maritime jurisdiction may issue against the said steamship Nassau, late Gordon, her tackle, apparel and furniture, boats and other appurtenances; that all persons claiming any right, title or interest in the said steamship or vessel, may be cited to appear and answer all and singular the matters aforesaid, and that the said steamship may be condemned and sold to pay the demand and claim aforesaid, with interest and costs, and that your libellants may have such other and further relief as in law and justice they may be entitled to.

SAMUEL HARLAN, JR.,
ELIJAH HOLLINGSWORTH,
JOHN T. GANSE, *Libellants,*
By I. T. WILLIAMS, *their Attorney.*

I. T. WILLIANS, *Proctor for Libellants.*

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Isaiah T. Williams, being duly sworn, says that he is the attorney of the above-named libellants, and their proctor in the action above referred to; that he drew the foregoing libel, and knows the contents thereof; that said libellants reside in Wilmington, in the State of Delaware, and are now
7 absent from this State, as deponent is informed and believes; that, as deponent is informed and believes, it would not be safe to omit the issuing of process until this libel could be sent to Wilmington aforesaid to be sworn; that the said libel and all the statements therein are true, as deponent is informed and verily believes; that his information is derived from papers in possession of deponent and statements made to him by the agent of said libellants, who is now also absent from this State, as deponent is informed and believes.

I. T. WILLIAMS.

Sworn to before me this 16th day of June, 1862.

GEO. F. BETTS, *U. S. Com'r.*

Endorsed: 17, 200. U. S. district court, southern district of New York. Samuel Harlan, jr., Elijah Hollingsworth, and John T. Ganse *vs.* the steamship Nassau, late Gordon, her tackle, &c. Libel. I. Williams, proc. for libel'ts, 79 Nassau st.

Filed June 17th, 1862.

8 *Stipulation for libellants' costs, entered into pursuant to the rules and practice of this court, filed the 17th day of June, 1862.*

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the seventeenth day of June, in the year of our Lord one thousand eight hundred and sixty-two, by Samuel Harlan, jr., Elijah Hollingsworth, and John T. Gause, against the steamship Nassau, late Gordon, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the steamship Nassau, late Gordon, her tackle, &c., may be condemned and sold to pay the demands of the libellants, and the said libellants and Jose Jerman Ribon and I. T. Williams, sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their sureties execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or in case of appeal, by the appellate court.

SAMUEL HARLAN, JR.,
ELIJAH HOLLINGSWORTH,
JOHN T. GAUSE,
By I. T. WILLIAMS, *Att'y in fact.*
I. T. WILLIAMS.
J. J. RIBON.

Taken and acknowledged, this 17 day of June, 1862, before me.
JOHN A. OSBORN, *U. S. Commissioner.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Jose Jerman Ribon and I. T. Williams, parties to the above stipulation, being duly sworn, doth depose and say that he resides in the southern district of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

J. J. RIBON.
I. T. WILLIAMS.

Sworn to this 17th day of June, 1862, before me.
JOHN A. OSBORN, *U. S. Commissioner.*

Recorded the 17th day of June, 1862.
GEO. F. BETTS, *Clerk.*

9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

[SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York, on the seventeenth day of June, in

the year of our Lord one thousand eight hundred and sixty-two, by Samuel Harlan, jr., *et al.*, against the steamship Nassau, her tackle, &c., (libel for repairs, $10,246 15,) for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had that the said steamship or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said steamship or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 8th day of July next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction otherwise, on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Samuel R. Betts, judge of the said court, at the city of New York, in the southern district of New York, this 17th day of June, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

GEO. F. BETTS, *Clerk.*

I. T. WILLIAMS, *Proctor of Libellant.*

10 In obedience to the within monition, I attached the steamship Nassau, her tackle, &c., therein described, on the 17th day of June, 1862, being at the time in the custody of the prize commissioners, and have not given due notice to all persons claiming the same, that this court will, on the 1st day of July inst., (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

ROB. MURRAY, *U. S. Marshal.*

Dated 1 July, 1862.

Monition ret'ble 8th July, 1862.

I. T. WILLIAMS, *Proctor for Libellant.*

Filed 8th July, 1862.

11 United States district court for the southern district of New York, in admiralty.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. Gause
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C.

Please take notice that I shall apply to this honorable court, at the chambers thereof, on the 28th day of instant, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a rule or order, directing the immediate sale of the said steamship, her tackle, apparel, furniture, boats, and other appurtenances, and that the proceeds of such sale be brought into court to abide the final decree in this action, and for such other or further rule or order as to the said court shall seem fit and proper in the premises, which motion will be founded upon the libel filed in this action

and all other proceedings had thereon, and upon affidavits, copies of which are herewith served on you.

Dated New York, June 24th, 1862.

Yours, &c., I. T. WILLIAMS,
Proc. for Libellants, 79 *Nassau st.*

To CHARLES EDWARDS, Esq., *Proctor for Vessel, &c.*
E. H. OWEN, Esq.
E. D. SMITH, Esq., *U. S. Att'y.*

12 District court of United States for the southern district of New York, in admiralty.

SAMUEL HARLAN, JR., *et al.*
vs.
THE STEAMSHIP NASSAU, HER ENGINE, TACKLE, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Isaiah T. Williams, being duly sworn, says that he is proctor for the libellants in this action; that process was issued therein on the 17th day of June instant to the marshals, and on the same day, as deponent is informed and believes, the said marshal attached said steamship thereunder, and has ever since held her, and still holds her, by virtue of the said process.

I. T. WILLIAMS.

Sworn to before me this 23rd day of June, 1862.

THATCHER M. ADAMS,
[SEAL.] *Notary Public in and for the City and County of New York.*

13 District court of the United States, southern district of New York, in admiralty.

SAMUEL HARLAN, JR., *et al.*, libellants,
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas Southmayd, being duly sworn, says that he is by profession an engineer, and has been so for nearly twenty years last past; that he knows the said steamship Nassau and has known her ever since she was built, in 1851 or 1852; that he went on board of said steamship in April last as her engineer and has continued on her as such engineer until near the present time; that said steamship now lies at the Union Storehouse, in Brooklyn, and is leaking badly, requiring to be pumped out as often as two or three times a week with the donkey pumps; that said steamship has no conveniences or facilities for pumping her by hand; that said steamship is lying in an exposed condition, and that her hull is receiving constant damage from the effect of the sun; that her machinery is rusting very fast, the effect of
14 which is doing said steamship permanent injury; that the effect of rust upon the pistons and all her various connections is to utterly destroy the same for any practical purpose about said engine, and that said engine would thereby become nearly worthless.

Deponent further says that the general condition of said steamship is bad, that she needs very considerable work to be done upon her by way of repairing, clearing, and putting her in condition to resist the rapid progress of waste, damage, and decay; that deponent is of opinion that her immediate sale is required by the interest of all concerned.

THOMAS SOUTHMAYD.

Sworn to before me this 20th day of June, 1862.

[SEAL.] THATCHER M. ADAMS,
Notary Public in and for the City and County of New York.

District court of the United States, southern district of New York, in admiralty.

SAMUEL HARLAN, JR., *et al.*
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C.

15 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Elias B. Brown, being sworn, says that he has been engaged in shipping business in the city of New York for many years, and during that period has had very large dealings in ships, steamboats and steamships, as well as in building, fitting and repairing as in the navigation and otherwise, as ship's husband and owner; that he has carefully examined said steamship Nassau; that said steamship is rapidly going to decay and waste and is suffering great damage from her present want of repairs, cleaning and care, as well as from the sun, in her present condition and exposed situation; that he verily believes that were said steamship now exposed to sale she would not bring to exceed $12,000 or $15,000, and that, in opinion of deponent, if she is left in her present position and condition she would not, by the time this action would, in the ordinary course of proceeding, be brought to a close, bring to exceed one half the sum aforesaid; that, in the opinion of deponent, it would be for the interest of all concerned to have said steamship sold without delay.

ELIAS B. BROWN.

Subscribed and sworn to before me this 20th day of June, 1862.

16 [SEAL.] THATCHER M. ADAMS,
Notary Public in and for the City and County of New York.

Endorsed: U. S. district court, so. district of N. Y. Samuel Harlan, jr., *et al.*, *vs.* the steamship Nassau, her tackle, &c. Affidavits of Thomas Southmayd and Elias B. Brown. J. F. Williams, proc. for libel'ts, 70 Nassau st.

District court of the United States for the southern district of New York, in the matter of the steamer Nassau and her cargo, taken as prize.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert Murray, being duly sworn, deposes and says that he is marshal of the southern district of New York and has had occasion to examine into the condition of the above-named steamer Nassau, which now lies at the dock of the Union Stores, Brooklyn; that said steamer is leaking very badly
17 and cannot be kept afloat without daily pumping; that said pumping must be done by what is known as the donkey pump, a steam pump on board of such vessel, to work which requires the care and employment of an engineer; that said pump must be kept in operation several hours each day. Deponent believes that a prompt sale of the said vessel is necessary for the protection of said property.

ROB. MURRAY.

Subscribed and sworn to this 17th day of June, 1862.

HENRY H. ELLIOTT,
U. S. Prize Com'r.

Endorsed: U. S. district court, S. district of N. Y. In the matter of the steamer Nassau and her cargo, taken as a prize. Affidavit of marshal.

Fly leaf endorsed: 17, 200. U. S. district court, S. district of New York.

Samuel Harlan, jr., *et al. vs.* the steamship Nassau, her tackle, &c. Notice of motion and affidavits. I. T. Williams, lib'ts' proctor.

18 We admit service of copies of the within papers.
June 24th, 1862.

E. H. OWEN.

Adj'd to the 30th June inst., at 11 a. m.
June 28, '62.

SAM. R. BETTS.

Filed 24 June, 1862.

19 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 8th day of July, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel R. Betts, district judge.

SAMUEL HARLAN, JR., *et al.*
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C. } 17, 200.

The marshal having returned the monition issued in the above-entitled cause, "I attached the steamship Nassau, her tackle, &c., being at the time in the custody of the prize commissioner, and have not given due notice, &c., &c.," the United States district attorney, on the part of the government, and Mr. Charles Edwards, on behalf of the claimants of vessel, appear and move that the libel in this action be dismissed.

Motion adjourned to Saturday next, the 12th inst.

21 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the 23d day of July, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel R. Betts, district judge.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND John T. Ganse
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C.

On reading and filing motion papers of libellants asking an interlocutory order for the sale of the steamship herein as perishing, and also on reading and filing certificate of the U. S. prize commissioner for this district that the said steamship is in their custody, having been seized as prize of war, and after hearing advocates in support of such motion and in opposition thereto, now, on motion of E. Delafield Smith, U. S. district attorney, and of Charles Edwards, esq., advocate for claimants of said steamship, it is ordered that said application for the sale of said steamship be, and the same hereby is, denied.

SAMUEL R. BETTS.

22 Filed the 23d day of July, 1862.

23 U. S. district court.

SAMUEL HARLAN, JR., *et al.*
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C.

THE UNITED STATES OF AMERICA, *ss:*

E. Delafield Smith, attorney of said United States for the southern district

of New York, hereby appeal, herein intervening for their interest in the steamship Nassau, an alleged prize of war, and move to dismiss this cause upon return of the marshal on the monition and writ of attachment herein.

July 29, 1862.

E. DELAFIELD SMITH, *U. S. Attorney.*

Endorsed: 17, 200. U. S. district court. Samuel Harlan, jr., *et al. vs.* the steamship Nassau, her tackle, &c. Notice of appearance for U. S. E. Delafield Smith, U. S. dist. att'y.

Filed July 29th, 1862.

24 *Stipulation entered into pursuant to the rules and practice of this court, filed the 22d day of Sept.*, 1862.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the 17th day of June, in the year of our Lord one thousand eight hundred and sixty-two, by Samuel Harlan, jr., and others against the steamship Nassau, late Gordon, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamship, &c., may be condemned and sold to pay the demands of said libellants, and the parties hereto hereby consenting that in case of default or contumacy on the part of the claimant or his surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands. And whereas, also, a claim is about to be filed in said cause by Augustus John Adderly:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal, by the appellate court.

AUGUSTUS JOHN ADDERLY,
By CHAS. EDWARDS, *his Attorney.*
CHARLES EDWARDS.

Taken and acknowledged this 22 day of Sept., 1864, before me.

GEO. F. BETTS, *U. S. Commissioner.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles Edwards, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHARLES EDWARDS.

Sworn to this 22d day of Sept., 1862, before me.

GEO. F. BETTS, *U. S. Commissioner.*

Recorded 22 day of Sept., 1862.

25 United States district court, southern district of New York.

THE STEAMSHIP NASSAU, HER TACKLE, &c.,
ads.
SAMUEL HARLAN, JR., AND OTHERS.

SIR: Please to take notice that on the return of the monition or process herein, with the marshal's return thereon, and on the certificate of the prize commissioners, read before Judge Betts, on motion to sell the above ship

and on the libel herein, I shall move the court, on the 8th day of July instant, at the opening of the court, or as soon as advocate can be heard, that the libel herein be dismissed and monition or process set aside, or for such other or further order as may be proper.

New York, 5th July, 1862.

Yours,

CHARLES EDWARDS,
Proctor for Claimant of vessel.

To I. T. WILLIAMS, Esq., *Proctor for Libellant.*

26 Endorsed: 17, 200. U. S. district court. The Nassau, &c., *ads.* Samuel Harlan, jr., &c. Notice of motion to dismiss libel. Charles Edwards, for claimant.

Filed 22nd Sept., 1862.

27 OFFICE OF THE UNITED STATES PRIZE COMMISSIONERS
FOR THE SOUTHERN DISTRICT OF NEW YORK, 39 CHAMBERS ST.,
New York, June 27, 1862.

This is to certify that the prize steamer Nassau arrived in this district on the 2nd day of June instant, and was delivered into the hands of the prize commissioners on that day by Prize Master Milton Hoxten, and that she continued in the custody of such commissioners, no libel having been issued or filed in the case.

[SEAL.] HENRY H. ELLIOTT, *U. S. Prize Com'r.*

Endorsed: U. S. *vs.* the steamer Nassau. 17, 185. Certif. of prize comm'r as to vessel being in custody of prize com'r, no libel being filed.

Filed 28th June, 1862.

28 U. S. district court, southern district of New York.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND John T. Ganse
vs.
THE STEAMSHIP NASSAU, LATE GORDON, HER TACKLE, &C.

UNITED STATES, *Delaware District, ss:*

John T. Ganse, being duly affirmed, says that he is one of the libellants in the above action; that the repairs and materials in said libel stated to have been done and supplied by deponent and said other libellants, his co-partners in business, were truly and bona fide so done and supplied upon and on account of said steamship, as in said libel stated, and that the balance or sum of $10,246 36, with interest, is still truly and bona fide due and owing to libellants as therein stated. And deponent further says that deponent and his co-libellants are, and each of them is, loyal to the government of the United States, and that neither deponent nor either of his said co-partners, co-libellants with him in this action, now have, or at any time have had, any control, directly or indirectly, over said steamship, her
29 navigation or employment, nor are they, or either of them, responsible for any diversion of said steamship to uses or purposes hostile to the government of the United States or in contravention of any law or proclamation of blockade, or otherwise, in case any such diversion shall be shown to have occurred. And deponent further says that no collision or private understanding exists, or has ever existed, between said libellants, or either of them, and the owner or owners of, or others interested in, said

steamship in reference to such the claim of said libellants for materials and repairs as aforesaid, for the purpose of defeating or abridging in any manner the rights, interests, or claims of the government of the United States, or of any captors, prize agents, or others claiming an interest in or right of action against said steamship; but that the above action has been instituted in good faith and for the sole purpose of enforcing what said libellants are advised to be their lawful lien and charge upon and against said steamship, &c., in the respects aforesaid. And this deponent further says that the owner or owners of said steamship are, as he is informed and believes, personally irresponsible and incapable of meeting the claim of libellants,
30 who are wholly remediless, save as against the body of the said steamship, her machinery, tackle, furniture, and apparel.

JOHN T. GANSE.

Affirmed to before me this nineteenth day of July, 1862.

[SEAL.] LEONARD E. WALES,
U. S. Commissioner for Delaware District.

Endorsed: 17, 200. U. S. district court, southern district of New York. Samuel Harlan, jr., Elijah Hollingsworth, and John T. Ganse *agst.* the steamship Nassau, her tackle, &c. Affidavit of John T. Ganse. I. T. Williams, proc. for lib'l'ts, 79 Nassau st.

Filed 22d Sept., 1862.

31 United States district court for the southern district of New York.

THE STEAMSHIP NASSAU, HER TACKLE, APPAREL, AND furniture.
ads.
SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. Ganse.

To the Honorable Samuel R. Betts, judge of the district court for the southern district of New York:

The claim, exceptions, and answer of Augustus John Adderley, of Nassau, N. P., merchant, owner of the above steamship Nassau, her tackle, apparel, and furniture, to the libel of the above Samuel Harlan, jr., Elijah Hollingsworth, and John T. Ganse.

First. That the respondent is sole owner of the said steamship Nassau, her tackle, apparel, and furniture, and was so at the time of the filing of the said libel.

Second. The respondent excepts to the said libel and to the relief therein claimed, for that the said steamship Nassau, her tackle, apparel, and furniture, was in the purview of a prize court at the time the libel herein
32 was filed and prior to any monition being issued thereon, and has ever since continued and still is in such prize court under libel in prize and as prize of war by the United States of America, namely, within and on the prize side of the United States district court for the southern district of New York; that she was brought within the said district as such prize on the second day of June, 1862, and proceedings in prize are still going on against her, and all which has been well known to the libellants herein from the day the said vessel was so brought in as alleged prize; that on an application on behalf of the libellants herein to have the said vessel sold it was met by opposition from the United States district attorney on the ground of the said libellants having no standing while the vessel was thus in a prize court, and which ground and objection were sustained by the

court; and this respondent claims leave to refer to the decision of the court therein, and asks the benefit of the same, and so that the objection which he now makes to this court, taking jurisdiction under the circumstances aforesaid, may be thereby strengthened.

Third. And this respondent not waiving but insisting upon his ex-
33 ception and objection aforesaid, and by way of answer, in case it shall be adjudged by the court that he is driven to answer the libel herein, denies, so far as he knows, has been informed, and believes, that all the repairs were made or that the balance claimed in the libel is due; also denies that the said libellants have had any lien given to them or have a lien on the said steamship, her tackle, apparel, or furniture, for any of such alleged repairs or for any balance on account of any such alleged repairs.

Wherefore, this respondent claims dismissal of the said libel with costs and disbursements.

AUGUSTUS JOHN ADDERLY,
By CHARLES EDWARDS,
His Attorney and Agent.

CHARLES EDWARDS, *Proctor and Advocate.*

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Charles Edwards, being sworn, maketh oath and saith that his agent for the above respondent, who is at this time out of the jurisdiction of this court; that he has read the above petition, and knows its contents, and believes, from all he knows or has been informed, that the same is true.
34 CHARLES EDWARDS.

Sworn at the city of New York, this 22nd day of September, 1862, before me.

[SEAL.] A. C. WILMARTH, *Notary Public, New York.*

Endorsed: 17, 200. U. S. district court, south. dist. of N. Y. The steamship Nassau, &c., &c., *ads.* Samuel Harlan, jr., and others. Claim, exceptions, and answer of Aug's John Adderly.
Filed Sept. 22, 1862.

35 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Monday, the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel R. Betts, district judge.

SAMUEL HARLAN, JR., AND OTHERS
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C. } 17, 200.

On reading and filing notice of motion, &c., Mr. Edwards moves that the libel in the above-entitled action be dismissed, and argues in support of said motion.

Mr. Upton argues on behalf of the captors of said vessel and the United States.

Mr. I. T. Williams argues in opposition to the motion.

C. A. V.

36 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Wednesday, the 1st day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel R. Betts, district judge.

SAMUEL HARLAN, JR., *et als.*
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &c., JOHN AUGUSTUS ADDERLY, claimants. } 17, 200.

This case having been heard on a motion on the part of the claimant of said steamship Nassau, that the libel filed in this action be dismissed, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the libel filed in this action be, and the same is hereby, dismissed, with costs to be taxed against said libellant.

SAM. R. BETTS.

37 Filed the first day of October, 1862.

38 District court of the United States for the southern district of New York.

HARLAN AND OTHERS
ag'st
THE STEAMSHIP NASSAU, &c.

SIR: The libellants intend to appeal from the final decree of the court in this cause.

Dated 3rd October, 1862.

I. T. WILLIAMS, *Proctor for Libellants.*

To GEORGE F. BETTS, Esq., *Clerk.*

Endorsed: 17, 200. District court, southern district of N. Y. Harlan and others *ag'st* the steamship Nassau, &c. Notice of appeal. I. T. Williams. Filed 4th October, 1862.

39 Circuit court of the United States, southern district of New York.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN J. GANSE, appellants,
vs.
THE UNITED STATES AND AUGUSTUS JOHN ADDERLY, claimants of the steamship Nassau, late Gordon, her tackle, &c., appellees.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit:

The appeal of the above-named appellants respectfully showeth that on or about the 17th day of June, 1862, the above-named appellants exhibited their libel in the district court of the United States for the southern district of New York, against the steamship Nassau, late the Gordon, her tackle, apparel, and furniture, claiming a maritime lien to an amount exceeding the sum of $50, and praying, among other things, for the reasons set forth in said libel, that the said steamship might be condemned and sold to pay the demand and claim of the said appellants and costs in said libel men-

40 tioned.

That process was duly issued out of the said court in this suit, to the honorable marshal of the said district, who thereon made return that he had, in obedience thereto, arrested the said vessel, her tackle, &c., the same being at the time of the arrest in the custody of the prize commissioners.

That on the 29th day of July, 1862, the United States district attorney perfected his appearance in this suit, intervening on behalf of the government of the United States, for their interest in the said steamship as an alleged prize of war. And on the 22nd day of September, 1862, an appearance was perfected for and on behalf of Augustus John Adderly, claiming as sole owner of the said steamship.

That on the said 22nd day of September, 1862, a motion was heard before the Honorable Samuel R. Betts, judge of the said district court, by and on behalf of the said claimants respectfully, that the said libel of these appellants be and stand dismissed from and out of the said district court; which said motion having been approved by and on behalf of the appellants, the said Hon. Samuel R. Betts, after hearing argument thereon, was
41 pleased to grant the said motion, and by his final decree, made herein on the 1st day of October, 1862, to order that the said libel be dismissed with costs against the appellants. And these appellants are advised that the said decree is erroneous, inasmuch as these appellants were entitled to enforce their claim against the said steamship, in the district court aforesaid, notwithstanding the causes alleged in and by said decree and order. And these appellants, for these and other reasons, appeal from the said decree dismissing the said libel and every part thereof to the next circuit court to be held in the said district, and on the said appeal they intend to have their said cause prosecuted and heard anew on the pleadings in the district court and on further proofs to be introduced in the said circuit court, in case they should be so advised. And they pray that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made as to the said circuit court shall seem just, and that the appellees may be condemned to pay to
42 the appellants their costs in the premises.

I. T. WILLIAMS,
Proctor for Appellants, 79 Nassau st.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Alexander L. Telfer, of the city of New York, clerk, being duly sworn, says that on the fourth day of October, 1862, he served a copy of the foregoing appeal on E. Delafield Smith, the proctor for the United States, by delivering the same to him personally, and that on the same day he also served a copy of the said appeal on Charles Edward, proctor of the claimant Augustus John Adderly, by leaving the same in his office, with the person in charge thereof.

A. L. TELFER.

Sworn to before me this 7th day of October, 1862.
[SEAL.] THOS. SADLER, *Notary Public.*

Endorsed: 17,200. Circuit court of the United States, southern district of New York. Harlan and others, claimants of the steamship Nassau, &c., appellees. Appeal. I. T. Williams, proctor for appellants.
Filed Oct. 9, 1862.

43 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

SAMUEL HARLAN, JR., *et al.*, libellants and appellants,
vs.
THE STEAMSHIP NASSAU, HER TACKLE, &C., THE UNITED States of America and Augustus J. Adderly, claimants and appellees.

Know all men by these presents that we, Samuel Harland, jr., Jose J.

Ribon, and Isaiah T. Williams, are held and firmly bond unto the above-named claimants and appellees in the sum of five hundred dollars, to be paid to the said claimants and appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the ninth day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas the above-named libellants and appellants have prosecuted an appeal to the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named libellants and appellant shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

SAMUEL HARLAN, JR., [L. S.]
By I. T. WILLIAMS, *his Att'y.*
I. T. WILLIAMS. [L. S.]
J. J. RIBON. [L. S.]

Sealed and delivered and taken and acknowledged this 9th day of October, 1862, before me.

JOHN A. OSBORN, *U. S. Com'r.*

44 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Jose J. Ribon and Isaiah T. Williams, being duly sworn, depose and say and each for himself saith that he resides in the southern district of New York; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

I. T. WILLIAMS.
J. J. RIBON.

Sworn to this 9th day of Oct., A. D. 1862, before me.
JOHN A. OSBORN, *U. S. Com'r.*

Filed this 9th day of October, 1862.

45 At a stated term of the circuit court of the United States of America for the southern district of New York, in the the second circuit, held at the City Hall, in the city of New York, on Thursday, the 30th day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel Nelson, associate justice of the Supreme Court United States.

SAMUEL HARLAN *et al.*
vs.
THE STEAMER NASSAU, HER TACKLE, APPAREL, &C.

The appeal from the decree of the district court in this case coming on to be heard, Mr. Williams reads from the Apostles the testimony on the part of libellant.

Mr. Edwards on behalf of claimants. Mr. Upton on behalf of captors.

Cur. ad. vult.

46 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall, in the city of New York, on Wednesday, the 18th day of November, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The Honorable Samuel Nelson, associate justice of the Supreme Court United States.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, JOHN T. Gause, appellants,
vs.
THE STEAMER NASSAU, HER TACKLE, &C., AND CARGO, appellee.

An appeal having been taken herein from the decree of the district court made and entered in this cause on the 1st day of October, 1862, dismissing the libel therein, and counsel for the respective parties having been heard on said appeal, and due deliberation being had in the premises, now, on motion of E. Delafield Smith, United States district attorney, it is ordered, adjudged, and decreed that the decree of the district court so appealed from be, and the same is hereby, in all things affirmed.

S. NELSON.

47 United States circuit court, southern dist. of New York.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND John T. Gause, libellants and appellants,
vs.
THE UNITED STATES AND AUGUSTUS JOHN ADDERLY, claimants of the steamship Nassau, (late Gordon,) her tackle, &c., respondents.

To the honorable the Supreme Court of the United States:

The appeal of Samuel Harlan, jr., Elijah Hollingsworth, and John T. Gause, the above-named libellants and appellants, respectfully show that on the seventeenth day of June, 1862, the said appellants filed their libel in the district court of the United States for the southern district of New York against the steamship Nassau, (late Gordon,) her tackle, apparel, and furniture, in a cause civil and maritime, for the recovery of the sum of
48 $10,246 15, besides interest due and owing to the appellants, as material men for repairs done and performed and materials supplied by appellants to, for, and upon the said steamship Nassau, and that the said steamship was arrested upon process issued upon said libel. That thereupon Edward Delafield Smith, esquire, United States district attorney for the said southern district of New York, intervened on behalf of the United States, and claimed that the said steamship had been seized and was then in custody of said United States as prize of war, and a claim was also interposed on behalf of Augustus John Adderly, claiming as owner of the said steamship. That such proceedings were had in the said cause that on the 1st day of October, 1862, a motion having been made by the said Edward Delafield Smith, district attorney as aforesaid, on behalf of the said United States, that the said libel of the appellants be dismissed, a
49 final decree was made and pronounced therein by the district court, whereby it was in substance adjudged and decreed that the said libel be and stand dismissed out of the said court.

And that after such final decree your petitioners duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby into the said circuit

court and there heard anew, and such proceedings were had in the said circuit court that afterwards, on the 19th day of November, 1863, the said circuit court made a final decree in the said cause, whereby it was decreed that said decree of the district court be in all things affirmed, which said decree of the said circuit court is, as appellants are advised, erroneous and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of the said circuit court to the Supreme Court of the United States, and
50 respectfully pray that the said decree of the said circuit court, and libel, answers, pleadings, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court and every part thereof may be reversed and a decree made that the appellants are entitled to the relief prayed by their said libel, or such other decree as to the said Supreme Court shall seem just.

Dated New York, Dec'r 21, 1863.

I. T. WILLIAMS, *Proctor for Appellants.*

Endorsed: U. S. circuit court, S. D. of New York. Samuel Harlan, jr., *et al. vs.* the United States *et al.* Appeal. I. T. Williams, proct. for appellants, 79 Nassau st.

Filed Jan'y 7, 1864.

51 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. Gause
vs.
THE UNITED STATES AND AUGUSTUS JOHN ADDERLY, claimants of the steamship Nassau, (late Gordon,) her tackle, &c.

Know all men by these presents that I, Stephen A. Brown, of the city, county, and State of New York, are held and firmly bound unto the above-named United States and Augustus John Adderly in the sum of five hundred dollars, to be paid to the said United States and Augustus John Adderly, for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated the eighth day of January, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named Samuel Harlan, jr., and others have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Samuel Harlan, jr., and others shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their said appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

STEPHEN A. BROWN. [L. S.]

Sealed and delivered, and taken and acknowledged, this 8 day of Jan'y, 1864, before me.

R. E. STILWELL, *U. S. Com'r.*

52 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Stephen A. Brown, named in the within obligation, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

STEPHEN A. BROWN.

Sworn to this 8th day of Jan'y, A. D. 1864, before me.

R. E. STILWELL, *U. S. Com'r.*

Filed this 8th day of Jan'y, 1864.

Approved Jan'y 8th, 1864.

W. D. SHIPMAN, *Judge.*

53 U. S. circuit court.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. Gause
v.
THE UNITED STATES AND JOHN AUGUSTUS ADDERLY, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph W. Forrestull, being duly sworn, says that on the 8th day of January, 1864, he served a copy of the appeal and a copy of the citation filed in this cause with the clerk of the circuit court upon E. Delafield Smith, esquire, attorney for the United States for the southern district of New York, by delivering a copy thereof, respectively, at the office of the said district attorney on behalf of the United States, the appellee in the above cause. And that on the same day he personally served Charles Edwards, the proctor for the appellee, Augustus John Adderly, with copies of the said appeal and citation, respectively, the said Augustus John Adderly being himself an alien, non-resident in the United States, and represented
54 in this cause by his said proctor, Charles Edwards.

J. W. FORRESTAL.

Sworn before me this 8th day of Feb., 1864.

JAS. H. COLEMAN,
Notary Public in and for City and County of New York.

55 By the Honorable William D. Shipman, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to the United States and Augustus John Adderly, claimants of the steamship Nassau, &c.:

Whereas Samuel Harlan, jr., Elijah Hollingsworth, and John T. Gause have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said United States and Augustus Johh Adderly, claimants of the steamship Nassau, (late Gordon,) her tackle, furniture, and apparel, and have filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the eighth day of Feb'y next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the eighth day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

W. D. SHIPMAN, *Judge.*

56 Endorsed: U. S. circuit court, S. D. of N. Y. Samuel Harlan, jr., *et als. vs.* the United States and Augustus John Adderly, claimants of the steamship Nassau, her tackle, &c. Citation. I. T. Williams, app'l'nts' proctor.

Filed Feb'y 8, 1864.

57 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from fol. 1 to fol. 89, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Samuel Harlan, jr., libellants and appellants, against the steamship Nassau, her tackle, &c., claimants and appellants, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28 day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Filed December 3, 1864.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

HARLAN AND OTHERS,
vs.
THE UNITED STATES AND A. J. ADDERLY, CLAIMANT OF STEAMSHIP NASSAU.
} No. 110.

Appeal from the Circuit Court of U. S. for the southern district of New York.

BRIEF OF UNITED STATES.

HENRY STANBERY,
J. HUBLEY ASHTON,
For United States.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

SAMUEL HARLAN, jr., ELIJAH HOLLINGSWORTH and John T. Gause, libellants and appellants,

vs.

THE UNITED STATES AND AUGUSTUS JOHN Adderly, claimant of the steamship Nassau, (late Gordon,) her tackle, apparel, etc.

No. 110.

Appeal from the circuit court of the United States for the southern district of New York.

I. THE FACTS.

On June 17, 1862, the appellants filed a libel in the district court of the United States for the southern district of New York, asserting a maritime lien on the steamship Nassau, late Gordon, for repairs done and materials furnished to and for said vessel, at Wilmington, Delaware, in July, 1860. A monition having issued thereupon, the marshal made return thereto that he attached the vessel on June 17, 1862, "*being at the time in the custody of the prize commissioners.*" (Rec., p. 4.)

The United States attorney, on the part of the government, and Charles Edwards, on behalf of the claimants of the vessel, moved that the libel be dismissed, (Rec., p. 7, 10,) which motion, on October 1, was allowed, and a decree entered dismissing the said libel. (Rec., p. 12.)

The opinion, filed by Judge Betts, states the ground of this decree as follows:

"I hold that the matter charged in the libel presents a case

within the jurisdiction of the prize court; that the libellants in this case have no authority in law to attach, in a private action, a vessel or her cargo which is under arrest as prize, and is within the cognizance of the prize court; and that, if the libellants have any legal or equitable demand against the vessel proceeded against in the prize court, the remedy must be sought in that tribunal." (Blackford's Prize Cases, 220.)

This decree was affirmed by the Supreme Court, (Rec., p. 15,) whereupon the present appeal was taken.

II. The Law.

1. *The vessel being, at the time of the filing of the libel, in the possession of the prize commissioners, was in the custody of the law, and subject only to the orders and decrees of the prize court of admiralty.*

1 Kent's Com., 101–103, *et. cas. cit.*

Act March 25, 1862, 12 Stat., 374.

2. *The libel was not sustainable as a claim for the captured vessel, or the proceeds thereof; as a mere lien on property captured jure belli is not an interest sufficient to support a claim in a court of prize.*

(*a*) A claim by the holder of bills of exchange, given for repairs by the owners of a captured vessel, rejected. (The Eenrom, 2 Rob., 5.)

(*b*) A claim by holder of a bottomry bond, given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress, rejected. (The Tobago, 5 Rob., 222.)

(*c*) Lien on freight and parcel of goods, pledged for the payment of the purchase money of the ship, held not sufficient to found a claim in a prize court. (The Mariana, 6 Rob., 24.)

Per Sir Wm. Scott, "captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties, which can have no operation as to them."

(*d*) A lien on property acquired by advances made upon the consignment not sustainable in a prize court. (The Frances, (Thompson's claim,) 8 Cranch, 335.)

(*e*) No lien on enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of captors in a prize court. (The Frances, (Irvin's claim,) 8 Cranch, 418.)

(*f*) A mortgagee of a captured vessel, out of possession, cannot assert a claim in a prize court. (Bolch *v.* Darrell. Bee's (Adm.) Rep., 74.)

(*g*) An interest under a bottomry bond is not assertable against a captured vessel. (*Per Marshall, C. J.*) (The Mary, 9 Cranch, 147.)

3. *The district court—as an instance court of admiralty—having no jurisdiction of this libel, and the right, claim, and demand therein alleged and asserted not being maintainable on the prize side of the court against the vessel, or the proceeds thereof, the order of the court dismissing the same was correct in law.*

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON.
Assistant Attorney General.

THE NASSAU AND CARGO.

Opinion of BETTS, J., (Blatchford's Prize Cases, 271.)

The proofs in this case show that the vessel, registered as English, evaded the blockade of the port of Wilmington, N. C., on the first of May, 1862, with a cargo of cotton and other produce of the enemy's country, destined to Nassau, N. P.; that, at Nassau she immediately took on board a lading consisting of arms and ammunition; and that, on the 22d of the

same month, she departed therefrom with such contraband cargo, and with papers by which her destination purported to be St. John, N. B., but took her course directly for Wilmington again, and was captured by the United States ship-of-war in its vicinity, and in the act of attempting to enter said port. The vessel and cargo, with several of the officers and crew, were sent to this port. A libel was filed July 12, 1862, and a claim in behalf of British subjects was filed July 29th last, claiming the vessel and cargo to be British property, by the British vice-consul at this port, with his test oath attached, verifying the prize to be British property according to the best of his knowledge and belief derived from his position in the consulate, and from conversations with the officers and crew of the vessel. The vessel had a British certificate of registry, executed May 16, 1862, to Augustus John Adderly, N. P. She was built in New York, in 1851. No bill of sale or paper transfer of her at the time of registry is produced. The bills of lading and clearance were made out on the 21st of May, as were also the shipping articles, at Nassau, for St. John, N. B. The master, the mate, the engineer, and the firemen, parcel of the ship's company, and three passengers on board, were examined on preparatory interrogations. Upon the proofs it is clearly shown that the owners of the vessel and her lading, and the ship's company, well knew of the existence of the war and of the blockade of the port of Wilmington when the vessel departed from that port on her last previous voyage, and when she attempted to re-enter it at the time of her capture; that on both occasions she was acting with an intention to violate the blockade, and that on the last occasion she was transporting to Wilmington articles contraband of war. It is, therefore, not requisite to detail more minutely the particulars of the proofs, or the doctrines of public law which determine the guilt and confiscability of the property.

A decree of condemnation and forfeiture of the vessel and cargo is rendered.

Supreme Court of the United States.

DECEMBER TERM, 1866.

SAMUEL HARLAN, JR., ELIJAH HOLLINGSWORTH, AND JOHN T. GAUSE, LIBELLANTS AND APPELLANTS,

vs.

THE STEAMSHIP NASSAU, (LATE GORDON,) HER TACKLE, &c., THE UNITED STATES, AND AUGUSTUS JOHN ADDERLY, CLAIMANT, &c.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT.

In the month of June, 1860, the steamer Gordon, (afterwards known as the Nassau,) entered the port of Wilmington, Delaware, in a damaged condition, and application was made by her master to the appellants, who are well known as extensive ship-builders at Wilmington, to make the necessary repairs, which they did, on the security of their general maritime lien, to the amount of $17,872 36. Of this amount the owners, who resided at Charleston, subsequently paid a portion, leaving a balance of $10,246 15 due to the appellants, at the time of the commencement of the rebellion and its resulting civil war.

In consequence of the rebellion, and the suspension of the authority of the Federal courts in Charleston and Savannah, the ports to which the Gordon belonged, it became impossible for the appellants to enforce their lien against the steamer, and nothing more was heard of her by them until about the 2d day of June, 1862, when she was brought into the port of New York, under the name of the "Nassau," in charge of a prize-crew, having, as was alleged, been captured and made

prize, by one of the national vessels, while attempting to evade the blockade of the southern ports, and immediately delivered into the hands of the prize commissioners. The appellants thereupon, on the 17th June, 1862, and before any prize suit had been commenced, filed their libel in the district court for the southern district of New York, setting up their claim and maritime lien, and praying the usual process and sale for payment.

On the 23d of the same month, the United States District attorney intervening for the interest of the Government in the steamship Nassau, "an alleged prize of war," filed a claim in the suit on behalf of the United States, and moved to dismiss the cause upon return of the marshal to writ of monition and attachment therein (fol. 23.)

Another claimant appeared on the 22d of September in the person of Augustus John Adderly, of Nassau, claiming to be sole owner, taking issue upon the claim of the libellants, and alleging the steamer to be the subject of a suit in the prize court and excepting to the jurisdiction, and on the 1st of October, 1862, upon the motion of district attorney and the claimant Adderly, a final decree was made by the district court, dismissing the libel.

The libellants appealed from this decree of dismissal to the circuit court, but the same was affirmed by that court on the 18th November, 1863, and the case now comes before the Supreme Court on appeal.

POINTS.—FIRST.

The order of dismissal was unwarranted and irregular.

There was no proof before the district court that the Nassau was lawful prize. The United States intervened only on the ground that the vessel was "an *alleged* prize of war." The fact that she had been captured by a national ship, and placed in charge of the prize commissioners, was not in itself evidence of her liability to capture, nor could it constitute a bar to the libellants' right to assert their lien claim in the admiralty court; until the captors establish their case against the vessel in the prize court, the libellants were *recti in curia*, as against the vessel, upon the facts alleged in their libel.

If the district court had ordered the libellants to stay proceedings in their action until a prize suit had been brought and determined, or had required them to intervene in the prize suit for the amount of their lien, there might have been some show of regularity. To dismiss their libel summarily,

without a hearing on its merits, and without alleging or showing the remotest irregularity in their proceedings, was error.

SECOND.

The ground taken on behalf of the Government that the prize court will not take cognizance of latent liens was not tenable in the present case.

1. The question did not arise in the prize court or in a prize suit. Only two questions could arise upon the libellants' action in the admiralty court, namely, first, (on the libel,) as to the libellants' claim and lien; secondly, (on the claim of the United States,) was the vessel or was she not lawful prize of war—had that been set up by the Government as a defence in an action. Assuming, for argument's sake, that right of prize superseded private liens, proof that the Nassau was lawful prize (not merely that she was an alleged prize) would have been necessary to oust the jurisdiction of the admiralty court and to bar the libellants' right to a decree.

2. The libellants and the owners of the Nassau were citizens of this Republic. The lien was acquired on the natural presumption that the general maritime law, which conceded it, would prevail whenever it was necessary to enforce it. If the owners, meanwhile, chose to forfeit their allegiance and to become traitors to their Government, the rights of the libellants, as loyal citizens, could not be thereby forfeited. There can be no analogy between their case and that of an alien's claim against the ship of a foreign enemy; yet it is upon a reported decision in such cases alone that the Government relies for sustaining the confiscation of the libellants' rights in this case.

The nearest analogy in this case is presented by proceedings in cases of forfeiture for breach of the revenue or navigation laws, or of the laws for the suppression of the slave trade. In such cases the liens of citizens have always been preferred to the claims of Government.

The St. Jago de Cuba (9 Wheaton, 409; 5 Cond. R. 635,) was condemned under the acts for the prevention of the African slave trade. A claim was put in by material men for repairs done to the vessel in an American port at the request of her captain. On appeal to the Supreme Court, Johnson, Justice, said: "The precedence of forfeiture has never been

carried further than to overreach *common law contracts* entered into by the owner, and it would be unreasonable to extend them further. The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned, that is, to complete her voyage." * * "The vessel must get on; that is the consideration that controls every other; and not only the vessels, but even the cargo is *sub modo* subjected to this necessity." * * * "From this view of the subject it results that the forfeiture does not ride over the rights derived under maritime contracts, whether they be called liens or privileges."

A. The grounds upon which prize courts have usually rejected the claims of neutral aliens intervening for private liens on enemy's ships are, *first*, that to allow such claims would be to open a wide door for fraudulent and collusive claims; and, *secondly*, that it would be unjust to allow such claims, because enemy's liens on neutral vessels could not be reached.

The Tobago, 5 C. Rob., 218; The Marianna, 6 C. Rob., 24.

Neither of these grounds apply to the present case.

1. The libellants in this case are not neutral aliens, but loyal citizens of the United States, and the vessel was an American vessel.

2. The reciprocity wanting in the case of a neutral claimant against a foreign enemy's ship is here present, since the claim of a rebel against a vessel owned by northern loyalists might have been condemned as confiscate.

B. Even where the ship has belonged to a foreign enemy, a marked distinction has been made in favor of liens claimed by subjects or citizens of the country of the captors. Such claims have been recognized and allowed in numerous cases.

In the case of the Belvidere, (1 Dods., 355,) the ship being a foreign vessel, had been driven by stress of weather into an English port, and was there discharged and repaired by British subjects. She was afterwards seized under embargo preceding hostilities, and a claim for the maritime lien was pronounced for in favor of the British subjects who had made the repairs.

Another claim against the same vessel (*ibid.*, p. 353) was

refused, because it did not appear that the claim *amounted to a lien.*

In that case, Lord Stowell said: "Cases have been stated, in which the court has certainly attended to claims somewhat similar, but in all those cases the parties had some certain evidence of their right. They had *either a positive lien on the ship*, or some specific security."

In the Vrow Sarah, cited in the note to the Belvidere, (1 Dods., 356,) a lien for repairs was allowed.

In the case of the Aina, captured during the last Russian war, Sir Stephen Lushington, in dismissing a claim for lien preferred on behalf of an alien having a Russian domicil, said: "It is a very different question whether lenity should be shown to British merchants, when the captured vessel had been lying in a British port, where they had had transactions in the way of business with it; and whether, as in cases of this kind, the court should allow *an alien* to put in a claim to defeat the right of the captors by upholding a claim in the nature of a mortgage on the enemy's vessel."

The Aina, 28 Eng. Law and Eq., R. 600.

The courts have also drawn a distinction between liens which are dependent upon contract and liens which attach by the general maritime law.

In the case of the "Frances," (8 Cranch, 418,) the Court said:

"This doctrine (the doctrine of lien by a factor) is unknown in prize courts, unless in peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties;" and the Court cites the case of freight upon enemy's goods seized in the vessel of a friendly neutral.

In the case of the Tobago, (5 C. Rob., 222,) which is chiefly relied upon in support of the general principle that prize courts recognize no latent liens, the claim was for a debt due to a British merchant on the bottomry of a foreign vessel, and in that case Sir William Scott said: "The person advancing money on bonds of this nature acquires by that act no property in the vessel; he acquires the *jus in rem*, not the *jus in re*." * * * "Those lending money on such security take this security *subject to all chances of war.*"

It will be seen that in the Tobago case the lien was emphatically one arising on contract—the lien claimed in this case was one independent of contract, attaching wholly by the general maritime law.

This ship was an American vessel, owned by Americans, and no one will for a moment contend that the repairs were made on her "subject to any chances of war."

"It is a general rule" says Upton (Mar. Warfare and Prize, p. 201,) "that the captor takes his prize *cum onere*, but" he adds "the onus must be one which is immediately and visibly incumbent. Thus if a captor take the cargo of an enemy on board the ship of a friend, he takes it subject to the liability for freight due to the owner of the ship, *because* by the general law of merchants, the cargo in the possession of the owner is subject to that liability *independent of contract.*"

How is this principle to be distinguished from the present case? The test question is, was or was not the lien claimed by the libellants and appellants in this case, a lien under the general maritime law independent of contract? If it was, then, under all the authorities, they had clearly a right to their suit to enforce it in admiralty, and the claim of the captor's was secondary to their's.

It can scarcely be necessary to adduce authority to show that the lien for repairs of a vessel in a foreign port, or in the port of another State, is a lien independently of contract. Its very essence is derived from the absence of contract. Contract, indeed, has been held to operate as a waiver of the lien. Contract forms no more an element in such a claim, than it does in the case of freight. The rates of freight are matter of contract, but the lien attaches by the general law of merchants. So in the case of repairs, the master orders them, and it may be, although not necessarily, contracts for the price, but the lien attaches by the general law and not by contract.

THIRD.

The attempt to confiscate the interests of loyal citizens, which happen to have been incorporated with the property of rebels is not only unjust, but is opposed to public policy.

The Government has recognized this injustice by the subsequent passage of an act, (Act of 37th Congress, Chap. 90, approved March 3d, 1863,) which provided for the payment of *bona fide* claims of loyal citizens, out of the proceeds of vessels or other property confiscated.

This act, independently of the fact that it was passed after the libellants' suit had been summarily dismissed, was held on petition not to apply to cases of prize. But the same principle is as applicable to the case in the prize court as in the

Court of Claims. The property of a rebel is captured in the attempt, as is alleged, to run the blockade. This, it is argued, makes her prize of war, and the rights of loyal citizens which are incorporated in her, and which the offence of the owners has put it out of their power to enforce against her, are pronounced forever confiscate, because she is such prize. But if the Nassau had been driven by stress of weather into a loyal port, and seized and proceeded against to confiscation as the property of rebels, the claim of the loyal citizen would have been undeniable in the Court of Claims.

Will this Court affirm such a solecism?

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Of Counsel for Libellants and Appellants.